

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 12-269 (JNE/SER)

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	UNITED STATES RESPONSE
v.)	TO DEFENDANT'S SENTENCING
)	POSITION PLEADING
DWIGHT FREDERICK BARNES,)	
)	
Defendant.)	

The United States of America, by and through its attorneys, John R. Marti, Acting United States Attorney for the District of Minnesota, and LeeAnn K. Bell, Assistant United States Attorney, submits its response to the sentencing position pleading of defendant Dwight Frederick Barnes (Dkt. 58).

I. DEFENDANT QUALIFIES AS A CAREER OFFENDER.

Defendant objects to the inclusion of his 1985 conviction from Michigan for unarmed robbery as a predicate offense under the Career Offender Guideline. First, whether this conviction qualifies or not is *irrelevant* as he has *two other qualifying convictions*: (1) a 1985 Conviction for Assault with Intent to Rob while Armed (PSR ¶ 35); and (2) a 2008 Conviction for Second Degree Sale of 3 Grams or More of Cocaine (PSR ¶ 37). Thus, the Court need not rule on whether the unarmed robbery conviction is a crime of violence.

Assuming *arguendo* that the Court decides to rule on whether Defendant's unarmed robbery conviction is a crime of violence, a review of the statute and applicable case law

show that it is categorically a crime of violence, and thus, a qualifying predicate under the Career Offender Guideline.

A. Defendant's Unarmed Robbery Conviction Has an Element of Use, Attempted Use or Threatened Use of Force.

A defendant is regarded as a Career Offender if: (1) he was at least eighteen years old at the time of the offense of conviction; (2) the offense of conviction is a crime of violence or a drug-related felony; and (3) he has two prior convictions for drug felonies or crimes of violence. See U.S.S.G. § 4B1.1.

Section 4B1.2 of the United States Sentencing Guidelines defines crime of violence as a felony which “(1) has an element or use, attempted use or threatened use of force physical force against the person of another; or (2) is a burglary of a dwelling, arson, or extorting, involves use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another.” U.S.S.G. § 4B1.2 (a). Thus, if a crime has an element of use, attempted use or threatened use of physical force, it meets the definition of a crime of violence.

Generally, the Courts use a “categorical approach” of simply looking at the elements of the offense to determine if they satisfy the definition. See United States v. Williams, 627 F.3d 324, 327-28 (8th Cir. 2010). If the statute of conviction criminalizes both conduct that does and does not qualify as a crime of violence, the Court may use the “modified categorical approach” using various items including charging documents, plea agreements and plea colloquies to determine the elements. Id.

Defendant was convicted of unarmed robbery under Michigan Statute Section 750.530. At the time of his offense, the statute provided as follows:

Sec. 530. Robbery unarmed--Any person who shall, by force and violence, or by assault or putting in fear, feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

Thus, there are three ways to commit the robbery in this statute (1) force and violence; (2) by assault; or (3) by putting in fear.

In 1980, five years prior to Defendant's conviction, the Michigan Court of Appeals clarified the difference between extortion and larceny:

although the two crimes are closely related and do overlap in several respects, unarmed robbery in Michigan encompasses a narrower set of circumstances. Larceny by fear of immediate bodily harm or violence to the person will be prosecuted as robbery; the unlawful obtaining of property by threats of a different nature, i.e., threats of future harm, will ordinarily constitute a different offense such as extortion.

People v. Krist, 97 Mich.App. 669, 296 (1980).

The Seventh Circuit examined this statute in United States v Tirrell, 120 F.3d 670 (7th Cir. 1997), to determine whether it categorically qualified as a crime of violence in the context of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The Seventh Circuit clarified, "under Michigan law, the element of putting in fear means threatening the use of physical force against the person of another." Id. at 680. Thus, the Seventh Circuit concluded that the Michigan law at issue here "has an element or use, attempted use or threatened use of force physical force against the person of another."

Notably, the Court need not speculate whether Defendant's the elements of Defendant's case required this definition as the jury instructions given in his case instructed that putting in fear "requires a forceful act that placed the victim in reasonable fear of immediate bodily harm while intending to put the victim in such fear." See Dkt. 58 at A11.

Defendant centers his argument on the fact that the statute itself does not define the "putting in fear" element. However, the case law did define it for the Michigan Courts and the definition does meet the definition of a crime of violence.

B. Defendant's Unarmed Robbery Conviction Otherwise Involves Conduct that Presents a Serious Potential Risk of Physical Injury to Another.

The Michigan Statute at issue in this case, also categorically "otherwise involves conduct that presents a serious potential risk of physical injury to another" as required under U.S.S.G. § 4B1.2 (a). See United States v. Mekediak, 510 Fed.Appx. 348, 2013 WL 49562 (6th Cir. 2012) (unpublished).

II. THE COURT NEED NOT RESOLVE DEFENDANT'S RELEASE DATE.

Defendant would like the Court to decide his release date from custody on his 1991 conviction for a prisoner possessing a weapon. See PSR ¶ 36. This need apparently stems from an argument Defendant believes was made by the United States in its sentencing position. See Dkt. 58 at 10. Defendant misunderstands the argument, and thus, the Court need not resolve this. The United States sole purpose was to outline Defendant's history to simply show that Defendant had been in custody nearly his entire life. It was irrelevant

to the argument of the United States precisely what charges were the basis of Defendant's custodial status, and thus, the Court need not rule on this issue.

Dated: September 17, 2013

Respectfully Submitted,

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